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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TREVOR ANTHONY JOHNSON, Defendant and Appellant.	E060494 (Super.Ct.No. CR68082) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and Appellant Trevor Anthony Johnson appeals from the superior court's order finding him ineligible for resentencing under Penal Code section 1170.26.[1] Specifically, defendant argues the trial court erred when it found him ineligible for resentencing without first holding an evidentiary hearing under *People v. Sumstine* (1984) 36 Cal.3d 909 (*Sumstine*) to determine the constitutionality of the disqualifying prior convictions.

PROCEDURAL BACKGROUND

The Disputed Priors—1989

In late 1989 in Los Angeles County, defendant pled guilty to forcible rape (§ 261, subd. (2)), forcible oral copulation (§ 288a, subd. (c)), and residential burglary (§ 459). He received a sentence of eight years in prison and, upon release, was required to register as a sex offender under section 290.

Guilty Plea, Sentencing and Various Challenges to 1989 Priors in Latest Case—1999-2000 and 2005

On October 8, 1999, defendant pled guilty to 19 counts of being a felon in possession of a firearm (§ 12021, subd. (a)) and one count of receiving stolen property (§ 496). During this plea hearing, defendant told the court that he had already filed a petition for writ of habeas corpus with the appellate court regarding what he was advised about prior to entering the 1989 plea, but that it had been summarily dismissed because he had not been able to obtain transcripts of the plea hearing. Prior to this plea hearing,

[1] All section references are to the Penal Code unless otherwise indicated.

on June 18, 1999, defendant filed a motion to strike under section 1385 in which he challenged the validity of his 1989 plea on constitutional grounds. Although the record on appeal contains neither the motion nor a transcript of the hearing, the minute order for that date indicates the court heard argument from counsel and then rejected defendant's constitutional arguments. Prior to sentencing on January 7, 2000, defendant received a court trial on his prior convictions from 1989. Defendant argued the 1989 plea was invalid because he was not advised of the direct consequences of the plea, specifically the sex offender registration requirements of section 290, until after he pled guilty.[2] The court rejected defendant's argument in part because he did eventually register. The court then found the prior conviction allegations to be true and sentenced defendant to 25 years to life on the first count, concurrent sentences of 25 years to life on the other 19 counts, plus one year consecutive for having served a prior prison term (§ 667.5, subd. (b)), for a total of 26 years to life. On February 22, 2005, the trial court held an ex parte hearing on "Correspondence submitted by Defendant re: New Trial on Special Allegations[.] Petitioners admissions were freely & voluntarily entered. Further; petitioner understood his legal and constitutional rights as well as the consequences of admitting those

[2] Interestingly, in arguing that his 1989 convictions should be invalid for sentencing purposes because he was not advised that he would have to register as a sex offender, defendant implies that his *Boykin-Tahl* rights were *not* violated during the 1989 plea: "Now, again, this is a due-process error. This is a due-process error in the line of *Boykin-Tahl*. *If this had been a situation where I was not advised of the rights in the jury trial*, that I pled guilty, I would have pleaded the same sentence and been out of the same situation *and the plea would have been invalid* because I was not told about the right to a jury trial." (Italics added.)

allegations. Court further finds most of the issues raised in this motion have been addressed by the Court of Appeal and have been determined to be without merit."

Petition for Resentencing Under Section 1170.126—2014

Fifteen years later, on January 2, 2014, defendant filed a petition for recall of sentence under section 1170.126. Defendant argued he should be eligible for discretionary resentencing because his 1989 convictions were invalid. In contrast to his arguments seeking to invalidate these convictions during the 1999 proceedings, defendant in 2014 contended the 1989 convictions were invalid because, at the time he pled guilty, he was not advised of his *Boykin-Tahl*[3] rights to a jury trial and to confront and cross-examine witnesses, and his privilege against self-incrimination. Defendant also argued he was entitled to an evidentiary hearing under *Sumstine* to address this claim.

On January 10, 2014, the court denied the petition because defendant was ineligible under section 1170.126, subdivision (e)(3), because of the 1989 conviction for forcible rape. The court did not hold the requested evidentiary hearing.

This appeal followed.

DISCUSSION

1. *Appealability*

The appealability of the denial of a section 1170.126 petition is currently being considered by the Supreme Court. (See, e.g., *Teal v. Superior Court* (2013) 217 Cal.App.4th 308, review granted July 31, 2013, S211708 [court held it was not

appealable]; *People v. Hurtado* (2013) 216 Cal.App.4th 941, review granted July 31, 2013, S212017 [court held it was appealable].) Even if we were to conclude it was a nonappealable order, we could consider, in the interest of judicial economy and because of uncertainty in the law, that defendant's appeal is a petition for writ of habeas corpus or petition for writ of mandate. (See *People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal from nonappealable order as petition for writ of habeas corpus]; *Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 852-853 [Fourth Dist., Div. Two] [treating appeal as petition for writ of mandate due to uncertainty in the law].) In any event, we will review defendant's appeal.

2. *Evidentiary Hearing Not Required for Eligibility Determination*

A. *Defendant's Arguments*

Defendant contends the superior court erred when it denied his section 1170.126 petition for resentencing without conducting an evidentiary hearing under *Sumstine* as to the validity of his 1989 convictions. This is because, as defendant contends, "[i]t is well-settled that, in a current proceeding, a defendant may collaterally attack on constitutional grounds a prior conviction being used to enhance his or her sentence." Defendant cites to *People v. Allen* (1999) 21 Cal.4th 424 (*Allen*) to support his contention: "In short, if a state desires to rely on a defendant's prior felony conviction to enhance his or her sentence, the prior conviction must be constitutionally valid. [Citation.]" Defendant

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3 *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*).

further reasons: "By parity of reasoning, to find that a defendant is ineligible for resentencing by relying on a constitutionally invalid conviction is also unconstitutional. Therefore, when a defendant, in a Penal Code section 1170.126 sentencing petition, declares under penalty of perjury that the purportedly disqualifying prior strike convictions are constitutionally invalid, the trial court must hold an evidentiary hearing to determine whether those convictions pass constitutional muster." As explained below, we find no such "parity of reasoning" and conclude the trial court need not hold an evidentiary hearing before determining a prisoner's eligibility for resentencing under section 1170.126.

B. *The Three Strikes Reform Act*

The Three Strikes Reform Act of 2012 (the Act) amended sections 667 and 1170.12 and added section 1170.12. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) The Act changed the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life. Under the original version of the three strikes law, a recidivist with two or more prior strikes who was convicted of any new felony was subject to an indeterminate life sentence. (*Ibid*.) "The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor." (*Ibid*.) If these exceptions do not apply, then the court is to sentence the defendant as a second strike offender. (*Id*. at pp. 167-168.)

Section 1170.126 establishes a procedure for qualified inmates serving indeterminate life sentences under the three strikes law to seek resentencing under the

terms of the amended law. Section 1170.126, subdivision (e), states that an inmate is eligible for resentencing if:

"(1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

"(2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

"(3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12."

If the court finds the defendant is eligible under section 1170.126, subdivision (e), then it shall resentence the defendant unless it determines that resentencing the defendant would pose an unreasonable risk of danger to public safety. This has been described as a three-step determination: "First, the court must determine whether the prisoner is eligible for resentencing; second, the court must determine whether resentencing would pose an unreasonable risk of danger to public safety; and third, if the prisoner is eligible and resentencing would *not* pose an unreasonable risk of danger, the court must actually resentence the prisoner." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1299 (*Kaulick*).)

C. *Boykin-Tahl Rights and Sumstine Hearings*

A trial court may not use a prior conviction to increase or enhance a defendant's sentence if the prior conviction was obtained in violation of the defendant's constitutional rights. (*Allen, supra,* 21 Cal.4th at p. 429.) Before a defendant may enter a guilty plea, he must knowingly and intelligently waive the constitutional rights to a jury trial and to confront witnesses and the constitutional privilege against self-incrimination. (*Boykin, supra,* 395 U.S. 238, 242; *Tahl, supra,* 1 Cal.3d 122, 132, superseded by statute on another ground as stated in *People v. Carty* (2003) 110 Cal.App.4th 1518, 1523-1524.)

At a defendant's current trial, the defendant may use a motion to strike to challenge the validity of a prior felony conviction on the basis that it was obtained in violation of his *Boykin-Tahl* rights. (*Allen, supra,* 21 Cal.4th at pp. 426, 429-30) When the defendant makes a sufficient allegation that the prior conviction was obtained in violation of *Boykin/Tahl* rights, the trial court must hold an evidentiary hearing, at which the prosecutor bears the initial burden of producing evidence that the defendant in fact suffered the prior conviction. (*Allen,* at pp. 435-436.) The burden then shifts to the defendant to produce evidence that his *Boykin/Tahl* rights were violated. (*Allen,* at p. 435.) The reviewing court must then examine the record "to assess whether the defendant's admission of the prior conviction was intelligent and voluntary in light of the totality of the circumstances. [Citation.]" (*People v. Mosby* (2004) 33 Cal.4th 353, 361.) A motion to strike only challenges the present effect of the prior felony conviction, but does not vacate the prior conviction. (*Sumstine, supra,* 36 Cal.3d at pp. 920-921)

D. *Sumstine Hearing not Required in Section 1170.126 Eligibility Proceedings*

As described above, defendant argues that a *Sumstine* hearing is also required at the eligibility stage (§ 1170.126, subd. (e)) when a prisoner submits a section 1170.126 petition and makes a sufficient allegation regarding the unconstitutionality of his prior convictions. We disagree for the following reasons.

First, as the People correctly point out, there is no language in section 1170.126 that states or even implies that an evidentiary hearing is required for a court's initial determination of eligibility for resentencing under subdivision (e). "Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e)." (§ 1170.126, subd. (f).) Neither is there any case law to date stating that such a hearing is required at that initial stage. (See *Kaulick, supra,* 215 Cal.App.4th at pp. 1298, fn. 21, 1299, fn. 22.) In contrast, the prisoner has a right to a hearing, and to be present at the hearing, for the determination of dangerousness and for the actual resentencing, based on the language found in section 1170.126, subdivisions (g)[4], (m)[5] and (i).[6] (*Kaulick* at pp. 1296-1300.)

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[4] "In exercising its discretion in subdivision (f), the court may consider: (1) The petitioner's criminal conviction history, including the types of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Second, the proceedings for recall and resentencing under section 1170.126 do not use a prisoner's prior felonies to enhance or increase[7] the prisoner's previously-imposed sentence. Rather, the proceeding is an "act of lenity on the part of the electorate" in which the original sentence may be modified downward, and so does not implicate the Sixth Amendment. (*Kaulick, supra,* 215 Cal.App.4th at pp. 1304-1305.)

Third, as thoroughly explained in *Allen,* allowing a defendant to have a *Sumstine* hearing upon a sufficient showing at a pre-sentence or pre-trial motion to strike is not constitutionally mandated, but rather is a policy decision made in the interest of efficient judicial administration: "Our decision in *Sumstine* thus was not based on constitutional imperatives, but on the policy judgment first announced in [*People v.*] *Coffey* [(1967)] 67 Cal.2d 204, that 'it is clearly in the interest of *efficient judicial administration* that attacks upon the constitutional basis of prior convictions be disposed of at the *earliest possible opportunity*, and we are therefore of the view that, if the issue is properly raised at or

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[5] "A resentencing hearing ordered under this act shall constitute a 'post-conviction release proceeding' under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law)." (§ 1170.126, subd. (m).)

[6] "Notwithstanding subdivision (b) of Section 977, a defendant petitioning for resentencing may waive his or her appearance in court for the resentencing, provided that the accusatory pleading is not amended at the resentencing, and that no new trial or retrial of the individual will occur. The waiver shall be in writing and signed by the defendant." (§ 1170.126, subd. (i).)

[7] This contrasts with the sentencing proceedings described in *Allen, supra,* 21 Cal.4th at page 429, at which a defendant's prior felonies can be used to enhance or increase the defendant's sentence, thus entitling him to an evidentiary hearing on the constitutionality of those prior felonies when the defendant makes a sufficient showing.

prior to trial, it must be determined by the trial court.' [Citation]." (*Allen, supra*, 21 Cal.4th at pp. 424, 435.) This rationale does not apply to a section 1170.126 proceeding because it takes take place often many years *after* trial and sentencing. As the People aptly argue, the better procedure is for a prisoner to challenge the prior conviction by separate writ of habeas corpus, rather than to append such a collateral challenge to section 1170.126 proceedings.[8]

Defendant does not challenge the trial court's findings that he is ineligible for resentencing because he has a prior felony conviction for forcible rape. (§§ 1170.126, subd. (e)(3); 667, subd. (e)(2)(C)(iv); 1170.12, subd. (c)(2)(C)(iv)(I).) Therefore, we affirm the court's ineligibility finding and hold that a court is not required to hold an evidentiary hearing as part of section 1170.126 proceedings based on a prisoner's claims that his prior convictions were unconstitutionally obtained for violation of his *Boykin-Tahl* rights.

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[8] We note that the record filed in this appeal shows that defendant has already unsuccessfully challenged the constitutionality of his 1989 prior felony convictions on at least four occasions, both pre-trial and post-trial, during the 1999-2000 proceedings. The first challenge took place as part of a pre-trial motion to strike these convictions under section 1385, which the trial court denied on June 18, 1999. The second was a petition for writ of habeas corpus that defendant filed with the appellate court at some point prior to his guilty plea. The third challenge found in this record took place during the court trial on the priors that took place on January 7, 2000, although at that time he based his constitutional challenge on not having been advised that he would have to register as a sex offender. Fourth, in February 2005, defendant made an ex-parte submittal to the trial court asking for a new trial on the prior convictions based on the violation of both his *Boykin-Tahl* rights and counsel's failure to advise him that he would have to register as a sex offender.

DISPOSITION

The trial court's ruling is affirmed.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.